

Service Date: January 2, 2003

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF WHITEHALL)	UTILITY DIVISION
WIND, LLC, Petition for QF Rate)	
Determination)	DOCKET NO. D2002.8.100
)	ORDER NO. 6444c

FINAL ORDER

Introduction

1. On August 2, 2002, Whitehall Wind, LLC (WHW), filed before the Public Service Commission (PSC) a petition to establish the price NorthWestern Energy (NWE) should pay for the purchase of electric energy generated by a proposed WHW wind-generation facility (50 megawatt facility near Whitehall, Montana). WHW is an affiliate of Northern Alternative Energy, Inc. (NAE), and Navitas Energy, Inc. NAE has obtained qualifying facility (QF) self certification for the WHW project through the Federal Energy Regulatory Commission (FERC). NAE has transferred (or will transfer) the QF self certification to WHW. WHW, as a QF, proposes to sell electric energy to NWE at the price that is established by the PSC in this proceeding. WHW's petition before the PSC is made pursuant to § 69-3-603, MCA (if a QF and utility are unable to mutually agree to a contract, the QF or the utility may petition the PSC).

2. On September 27, 2002, the PSC publicly noticed WHW's petition. A procedural order, protective order, various notices of staff action and PSC action, and a notice of public hearing have been issued in this proceeding. Discovery has been conducted among WHW, NWE, and the PSC. The Montana Consumer Counsel (MCC) has intervened in the matter. Pre-hearing arguments have been filed by WHW and NWE. A public hearing on WHW's petition was held November 15, 2002, in Helena. Public comment and technical evidence were received at that hearing. Public comments generally support the project from a local- and state-interest economic standpoint. The PSC agrees with MCC's view regarding public comment, which is there is "considerable support from the Governor's office, the Jefferson County legislative delegation, and

county economic development officials." Final briefs (post-hearing arguments) have been submitted by WHW, NWE, and MCC.

3. At least two prehearing actions by the PSC pertain to NWE and WHW motions to dismiss. The motions to dismiss were denied by the PSC on a preliminary basis, subject to reconsideration following additional procedures in the matter, primarily the prehearing briefs, hearing, and post-hearing briefs. *See, e.g., Notice of Commission Action on Motions to Dismiss, October 16, 2002.* The PSC sees no need to separately reconsider its previous prehearing actions.

4. The principal issues in WHW's petition are issues of law, including what law applies, what that law provides, the application of facts to law, and the application of procedural or evidentiary laws, such as burdens of proof and whether sufficient facts are of record for the PSC to render a decision granting or denying the petition. The PSC is required to have rendered a decision on the WHW petition within 120 days of the WHW application (by December 2, 2002). That requirement has not been met. At the time of this order WHW has not responded to PSC requests for waiver of the 120-day requirement.

Findings of Fact, Conclusions of Law, and Discussion

5. WHW's requested QF ratemaking is governed by provisions of the federal Public Utility Regulatory Policy Act of 1978 (PURPA), *P.L. 95-617, Title II, § 210, see, e.g., 16 USCS § 824a-3*, related federal (FERC) administrative rules, *see e.g., 18 CFR 292*, Montana's "mini-PURPA," §§ 69-3-601 through 69-3-604, *MCA*, and related state (PSC) administrative rules, *ARM 38.5.1901 through 38.5.1908* (any or all the preceding general citations may be referred to in this order as "PURPA and related" or "PURPA-related"). PURPA and related laws are designed to encourage and require a public utility to allow certain qualifying generators of electricity (*e.g.*, QFs, cogeneration) to supply energy and capacity to the public utility at a certain price. From an historical perspective PURPA breaks the monopoly utilities have on generation of electric power. *Steven Ferrey, Law of Independent Power, Development / Cogeneration / Utility Regulation, § 4.1, p. 4-4 (West Group, 2002).* "PURPA was designed primarily to conserve energy, reduce dependence on imported crude oil and refined petroleum products, and promote

the use of renewable energy resources." *Id.*, *fn. 3 (further citations omitted)*. PURPA requires (through FERC rules) encouragement of small power production and cogeneration and public utility purchases of electric energy from qualifying small power production and cogeneration facilities. *See, e.g., 16 USCS § 824a-3(a)*. Although there may have been rumblings or efforts during the past several years directed towards amending or repealing PURPA, repeal has not occurred. PURPA and related laws remain in effect today.

6. As of 1981 the PSC has adopted PURPA-related rules, including through adoption by reference 18 CFR § 292 (FERC rules), which provide for the general requirements for QFs eligible for consideration under PURPA. *ARM 38.5.1901(1) and 38.5.1902(1)*. Any small power production facility in Montana, which is a qualifying facility under FERC criteria is eligible to participate in arrangements for purchases and sales of electric power with electric utilities regulated by the PSC. *ARM 38.5.1902(2)*. A small power production facility is a qualifying facility if it meets the maximum size, fuel use, and ownership criteria specified by rule. *18 CFR 292.203(a)(1)-(3)*. WHW meets the criteria for small power production facility QF status: (a) the WHW facility does not exceed the maximum size limit of 80 megawatts, *18 CFR 292.204(a)*; (b) WHW's fuel use, at least 75 percent, is from a renewable resource, *18 CFR 292.204(b)*; and (c) ownership of WHW is not by a person primarily engaged in the generation or sale of electric power, *18 CFR 292.206*. As a result of meeting these federal requirements, WHW also meets Montana's statutory definition of "qualifying small power production facility" (produces electricity through renewable resources or cogeneration, has a production capacity not greater than 80 megawatts, and is owned by a person not engaged in the generation or sale of electricity). *§ 69-3-601(3), MCA*. The PSC determines WHW is a QF for purposes of this proceeding.

7. Federal law (PURPA applicable) defines "electric utility" as any person who sells electricity. *16 USCS § 796(22)*. Montana's mini-PURPA defines a "utility" as any public utility supplying electricity and regulated by the PSC. *§ 69-3-601(4), MCA*. NWE sells electricity, supplies electricity, and is regulated by the PSC. NWE meets the definitions applicable to WHW's petition. The PSC determines NWE is a public utility for PURPA-related purposes.

8. During June and July 2002 WHW tendered offers to negotiate with NWE

regarding NWE purchase of energy. NWE did not negotiate and ultimately informed WHW that NWE was not, at that time, doing negotiations of any kind. On August 2, 2002, after determining negotiations with NWE would not occur, WHW filed its petition before the PSC. Montana law provides that, if a QF and utility are unable to agree to a contract for the price of electricity to be paid by the utility, on petition of the QF or utility (or during the course of a PSC rate proceeding related to QF rates) the PSC shall require the utility to purchase at rates and conditions determined by the PSC. § 69-3-603, *MCA*. The PSC must render a decision within 120 days of receipt of the petition (or completion of the rate proceeding). *Id.* The PSC determines WHW did attempt to negotiate with NWE, NWE refused to negotiate with WHW, for all practical and legal purposes refusal to negotiate produces the equivalent of "unable to agree," and the conditions allowing WHW's petition are met. The PSC also determines it is discretionary in the PSC whether a QF price matter should be on petition or through a pending utility QF rate proceeding. To the extent the PSC must exercise its discretion in the present matter the PSC determines the WHW petition is an allowable method. It is not necessarily a better method, it might not be as good, but it is allowable.

9. WHW is critical of NWE's actions before and during this proceeding, suggesting NWE had a duty to negotiate in good faith, should have obtained information about WHW, could have addressed any concerns with WHW at any time, and has not abided by PSC rules pertaining to QF rates. The PSC cannot agree or disagree that NWE has invoked any strategy of delay and obfuscation. NWE obviously is reluctant regarding QFs, but NWE's actions in this particular instance also could be anything from bumbling ineptness to lack of resources to accomplish things in a timely manner. In any event NWE seems to agree it should have done things differently when first contacted by WHW. Whatever NWE's actions or lack thereof were, such might be complaint material, but are not price-setting material. Whether NWE has exercised poor judgment regarding QFs or WHW does not affect the price NWE should pay for energy generated by WHW. WHW appears to agree with this and that the focus should be on the price.

10. The primary purpose of WHW's petition is to determine the price applicable to NWE purchases of electricity generated by WHW. The law pertaining to this is straight forward.

A QF may generate electricity and may contract with a utility for utility purchase of that electricity. § 69-3-602, MCA. Rates for purchases shall be just and reasonable to consumers, in the public interest, and must not exceed the incremental cost to the utility. 16 USCS § 824a-3(b). "Incremental cost" means "the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source." *Id.*, § 824a-3(d); accord 18 CFR § 292.101(b)(6) and ARM 38.5.1901. Rates and conditions of the contract for sale of electricity by the QF must be set according to the following standards: long term contracts are to be encouraged to enhance the economic feasibility of the QF facilities; rates must consider availability and reliability of the QF-produced electricity; rates may be set by avoided cost over the term of the contract, cost of QF production plus return on investment, or any other method promoting the development of QFs. § 69-3-604(1), MCA. All purchases and sales of electric power between a utility and qualifying facility shall be accomplished through a written contract or standard tariff provisions. ARM 38.5.1902(5).

11. These laws provide the list of things critical in any QF price determination. Rates and conditions must be just and reasonable to consumers. Rates and conditions must be in the public interest. Rates must not exceed the utility's avoided cost. Long term contracts are to be encouraged. Availability and reliability of the QF production must be considered. And, all of this must be accomplished through contract or through PSC approved tariffs (both of which must necessarily ensure all of the requirements are met and, in the case of conflict between or among requirements, properly balanced). At the present time a negotiated contract appears unlikely between NWE and WHW. As a result, the rate applicable must be a NWE tariffed rate.

12. WHW seeks a long-term contract. In Montana, long-term contracts for QFs greater than 3 megawatt must be entered through QF selection by the utility through all-source competitive solicitation in accordance with ARM 38.5.2001 through 38.5.2012. ARM 38.5.1902(5). Between competitive solicitations utility purchases from QFs greater than 3 megawatt in size must be accomplished through the utility's short term standard avoided cost tariff (or through negotiation, which, again, appears unlikely for NWE and WHW at the present time). *Id.* The same applies to qualifying facilities not selected through solicitation. *Id.* Utilities

shall recompute short-term and long-term standard tariffed avoided cost rates (during each least cost plan filing, *ARM 38.5.2001 through 38.5.2012*) following public review and comments. *Id.* The procedure for establishing rates for purchases are as provided in ARM 38.5.1905. Contracts must include items listed at ARM 38.5.1902(5)(a) through (j). *Id.* Obligations of utilities to qualifying facilities are at ARM 38.5.1903. Obligations of qualifying facilities to utilities are at ARM 38.5.1904.

13. The PSC adheres to and supports the above. The parameters (PSC rules) of implementing PURPA-related requirements have long been established in Montana (PSC rules effective in 1982) and recognize that PURPA and related requirements may at times require significant balancing of competing interests and cautious approaches to approving price and terms related to public utility purchasing from QFs. Montana's requirements are not designed to bar entry into the QF market. Montana's requirements are designed to ensure the requirements of PURPA and related laws are fully met.

14. The subject utility in this proceeding, NWE, is a restructured utility, divested of generation, and selling electricity solely through its status as default supplier, a status that is temporary. This could raise legitimate concerns regarding long-term contracts. WHW is a wind-generation QF. Wind generation may present unique concerns in the QF setting. NWE suggests Montana must develop a means that properly addresses QFs for a utility operating as a default supplier and questions whether new long-term QF contracts make sense in the competitive market place, particularly in regard to adequate future loads and the potential for stranded costs. NWE is prepared to execute a contract with WHW under the appropriate tariff, but suggests WHW has not yet made (and first needs to make) certain fundamental decisions necessary for contracting. NWE suggests wind generation presents unique concerns, such as availability and reliability, and prices should be adjusted accordingly. NWE identifies specific factors WHW must consider and argues WHW is not ready to negotiate a contract. WHW suggests NWE ignores the special status of QF's and continues to reflect an anti-QF view. WHW provides information pertaining to Montana's wind resources, benefits to Montana and NWE ratepayers from the proposed WHW project, through the investment of over \$60 million, involvement of local labor, boosting of local

economies, increased tax revenues, and providing access to lower cost renewable resource. WHW states it has petitioned to save time because of NWE's failure to negotiate and the limited time remaining for wind projects to qualify for production tax credits. WHW explains it has limited the size of the proposed wind generation facility to 50 megawatts, but believes a 75 megawatt facility could be approved and has petitioned for that in the alternative. WHW argues it must know the price before it continues with its proposal, NWE's position on requirements for non-price decisions prior to price is unsound, and wind-generation has no reliability concerns that cannot be readily resolved.

15. The above concerns and arguments (*supra*, *para. 14*) do not dictate a departure from PSC rules. WHW is a QF greater than 3 megawatts in size. Neither WHW nor its affiliates have been a successful bidder in a competitive solicitation with NWE. For all practical and legal purposes related to PSC rules WHW is "between competitive solicitations." WHW must supply NWE through competitive solicitation, NWE's short-term standard avoided cost tariff, or through negotiation of a short-term contract with NWE (*supra*, *paras. 12 and 13*). Presently there is no competitive solicitation and negotiations have not produce a mutual agreement. What remains for WHW is the short-term standard avoided cost tariff (and competitive solicitation the next time one is conducted by NWE).

16. WHW argues that these PSC rules regarding contracts for QF's greater than 3 megawatts are in indefensible conflict with PURPA and related laws. WHW argues the same is true for the PSC rule on competitive solicitation. MCC argues the PSC rule reflects the discretion and the flexibility that states have in implementing PURPA. The PSC does not agree with WHW that its rules are in conflict with PURPA. If one views the rules from a QF market-entry perspective there could be a conflict. However, the rules are price oriented, not entry oriented. The rules create a mechanism that properly balances the requirements of PURPA and related laws (rates and conditions must be just and reasonable to consumers and must be in the public interest, rates must not exceed the utility's incremental or avoided cost, long term contracts are not a mandate, but are to be encouraged, availability and reliability of the QF-production must be considered in conditions of the contract, and so forth). Under the present circumstances,

considering all facts and arguments, there is no compelling reason not to follow these rule requirements.

17. The PSC determines the price applicable to NWE purchases of WHW-generated electricity is as established in NWE's short-term avoided cost tariff (NWE's short term power purchase schedule, STPP-1). This avoided cost is presently pending annual review in PSC Docket No. D2002.7.80 and has been recently set by PSC action approving interim rates (*Notice of Commission Action, August 14, 2002, affirmed on an interim basis through PSC Order No. 6434b, October 11, 2002*) at \$0.010639 per kilowatt hour. The PSC retains jurisdiction over this proceeding in the event WHW and NWE are unable to mutually agree on non-rate contract terms. The PSC has jurisdiction over development of contract terms, but generally does not have jurisdiction over enforcement of an entered contract.

ORDER

All pending motions, objections, arguments, and suggested findings and conclusions not ruled on above are denied.

IT IS HEREBY ORDERED that the price NWE will pay for WHW wind-generation will be in accordance with NWE's short term avoided cost tariff.

Done and dated this 18th day of December 2002, by a vote of 3-2.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

GARY FELAND, Chairman

JAY STOVALL, Vice Chairman
(Voting to Dissent)

BOB ANDERSON, Commissioner

MATT BRAINARD, Commissioner
(Voting to Dissent)

BOB ROWE, Commissioner

ATTEST:

Rhonda J. Simmons
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.